

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**





**NO. 77-4085**

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**UNITED STATES COURT of APPEALS**  
**FOR THE SECOND CIRCUIT**

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

NASSAU COUNTY HEALTH FACILITIES  
ASSOCIATION, INC., ET AL.,

*Respondents.*

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PLS

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

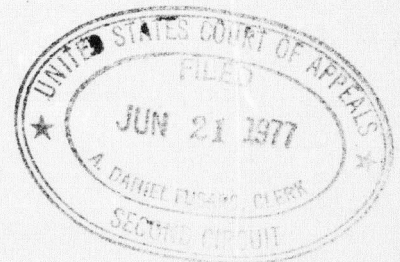
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ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE PRESENTED

Whether substantial record evidence supports the Board's findings that the employers violated Section 8(a)(5) and (1) of the Act by unilaterally and in midterm modifying the wage and benefit provisions of their collective bargaining agreements.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29



U.S.C., Sec. 151 et seq.), for enforcement of its order issued against the respondent nursing homes and health related facilities ("the Homes")<sup>1/</sup> on January 28, 1977. The Board's Decision and Order was issued by a three-member panel of the Board consisting of Members Jenkins, Penello and Walther, and is reported at 227 NLRB No. 249 (A. 3-24).<sup>2/</sup> This court has jurisdiction since the unfair labor practices occurred in Nassau, Suffolk, and Westchester Counties, New York.

# I. THE BOARD'S FINDINGS OF FACT

## A. Background; The Relevant Contract Provisions

The Homes are proprietary, profit-making institutions (A. 218). About 90 percent of their income is derived from Medicaid payments, the balance from private patient fees (A. 8; 160-162, 165, 215, 228-229, 235). The Homes may not charge Medicaid patients more than the applicable daily rate that, under state law, is fixed by the New York State Health Department (A. 5, 8-9; 54, 137, 161-162, 221-223, 235-237).

The Homes employ between four and five thousand persons as nurses, attendants, kitchen help, maintenance personnel, and clericals (A. 7; 144-145). Those employees are represented by various locals of the Union (A. 7; 72, 122).<sup>3/</sup>

<sup>1/</sup> Most of the Homes are nursing homes, which render intensive nursing care to patients; a few are health related facilities, which provide only social care to residents who can partly care for themselves (A. 7; 217-218). The multiple respondents in this proceeding are: Nassau County Health Facilities Association, Inc. and 16 of its members ("the Association"); St. James Nursing Home; St. James Plaza; Huntington Nursing Home; Hudson View Manor; Hudson View Nursing Home; Carillon House Nursing Home and Health Related Facility (collectively, "the Independents") (A. 5-6; 76-77).

<sup>2/</sup> "A." references are to the pages of the printed appendix; "G. C. Exh." refers to the voluminous collective bargaining agreements which we have lodged with the Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>3/</sup> Local 1115, Joint Board Nursing Home and Hospital Employees Union.

However, the Union's Joint Board negotiates and polices the collective bargaining agreements for all the affected locals (A. 7; 72). The bargaining practice has been for the Union to negotiate four separate, pattern-setting agreements with the Association covering four employee groups--namely, licensed practical nurses, registered nurses, <sup>nurse</sup> supervisors, and blue collar-unlicensed workers (A. 7; 73-74, 81, 84 ). Those four agreements generally are identical except for wage rates (A. 4; G.C. Exh. 2a-2d). The Independents then adopt the applicable Association contracts although sometimes with more favorable wage rates (A. 7; 77-83, 171, G.C. Exh. 3-8).

The current contracts were negotiated in late 1974 and became effective on January 1, 1975; each has a four-year term (A. 8; 26-36, 34, 81-82, 140-141, 179). In relevant part, the agreements provided successive wage increases on January 1 and July 1, 1975, 1976, 1977, with the Union having the option to reopen negotiations in late 1977 for 1978 wage increases (A. 10; 30-31, 34-35). Successive annual increases in the Homes' contributions to the employees' welfare and prepaid legal services funds also were scheduled (A. 10; 33). The 1975 wage and benefit increases were paid (A. 11; 91-94).

B. The Homes Refuse to Pay the Wage  
and Benefit Increases Due on  
January 1, 1976

In early December 1975, representatives of the Association and some of the Independents met with Union Vice President Alex DeLaurentis and notified him that they could not pay the 1976 wage and benefit increases (A. 11; 71, 94-97). The representatives explained that the Homes could not afford the increases because the Medicaid reimbursement rates chargeable by



the Homes during 1976 had, in effect, been frozen at their 1975 levels by the New York State Health Department (A. 9-10, 11; 54, 97-98, 188-190, 193, 199, 238-239). The Homes requested that DeLaurentis waive the increases, but he refused, stating that the Union would take nothing less than had been agreed upon (A. 11; 97-99, 124-125, 155, 164a). Between December 15 and 24, 1975, the Homes formally notified the Union in writing that the wage increases, cost of living adjustments, increased contributions to the welfare and legal services funds, and increases in sick leave, all due January 1, 1976, would be withheld because of the Medicaid rate freeze (A. 11-12; 37-49, 101-116). None of the scheduled 1976 increases have been paid (A. 12; 100-101, 104-116).

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing undisputed facts, the Board found, in agreement with the Administrative Law Judge, that the Homes had violated Section 8(a)(5) and (1) of the Act by unilaterally and in midterm modifying the wage and benefit provisions of their collective bargaining agreements, in derogation of the statutory obligations under Section 8(d) of the Act (A. 17, 23). The Board's order requires the Homes to cease and desist from failing and refusing to pay contractual increases in wages and benefits, or from otherwise modifying the provisions of their contracts, absent consent of the Union, and from in "any other manner" interfering with their employees' Section 7 rights (A. 18-19, 23-24). Affirmatively, the Board's order requires the Homes to honor, and to give effect to, the contractual wage and benefit provisions, retroactively from January 1, 1976; to make each employee whole for any losses in pay or other benefits; and to post the usual notices (A. 19-20, 23-24).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE HOMES VIOLATED SECTION 8 (a)(5) AND (1) OF THE ACT BY UNILATERALLY AND IN MID-TERM MODIFYING THE WAGE AND BENEFIT PROVISIONS OF THEIR COLLECTIVE BARGAINING AGREEMENTS WITH THE UNION

- A. The Homes unlawfully refused to pay the employees' wage and benefit increases required by the collective bargaining agreements

Section 8(d) of the Act--which defines the obligation to bargain--is intended to stabilize the agreed-upon conditions of employment during a contract term. N.L.R.B. v. General Electric Company, 418 F. 2d 736, 747 (C.A. 2, 1969), cert. denied, 397 U.S. 965. Accordingly, that section not only imposes an obligation on each party to a contract to refrain from modifying the contract in the absence of compliance with the statutory notice and waiting period requirements, but also Section 8(d) expressly provides that the

duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

In line with that provision, it has been consistently held that an employer acts in derogation of its bargaining obligation under Section 8(d), and thereby violates Section 8(a)(5) of the Act, when it alters mandatory contractual terms--such as, here, wages and benefits--during the effective period of the contract without the consent of the union. Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 158, 183-188 (1971),



citing with approval, N.L.R.B. v. Scam Intrument Corp., 394 F. 2d 884, 887 (C.A. 7, 1968), cert. denied, 393 U.S. 980. Accord: N.L.R.B. v. Oak Cliff-Golman Baking Company, 505 F. 2d 1302 (C.A. 5, 1975), cert. denied, 423 U.S. 826, enforcing without opinion, 202 NLRB 614, 616 (1973), and 207 NLRB 1063, 1064 (1973); Bastian-Blessing, Div. of Golconda Corp. v. N.L.R.B., 474 F. 2d 49, 53 (C.A. 6, 1973); N.L.R.B. v. Huttig Sash & Door Co., 377 F. 2d 964, 967-968 (C.A. 8, 1967). See also Shopmen's Loc. U. No. 455, etc. v. Kevin Steel Prod., 519 F. 2d 698, 702, 704 (C.A. 2, 1975); N.L.R.B. v. General Electric, supra; N.L.R.B. v. Highland Shoe, Inc., 119 F. 2d 218, 222 (C.A. 1, 1941); George E. Light Boat Storage, Inc., 153 NLRB 1209, 1219 (1965), enforced, 373 F. 2d 762, 766 (C.A. 5, 1967).

In the instant case, it is undisputed that the contracts' wage and benefit provisions were not subject to reopener until late 1977; that the Union therefore was not obligated to agree with or even discuss the Homes' proposal to omit the wage and benefit increases due January 1, 1976; and that the Union did not agree to any changes. A fortiori, by refusing to pay the increases due under their contracts--notwithstanding the Union's privileged opposition to any postponement--the Homes unilaterally and in midterm modified--and, in effect, repudiated--basic terms and conditions of employment within the meaning of Section 8(d), and thereby violated Section 8(a)(5) and (1) of the Act. See cases supra, pp. 5-6.

B. The Homes' defenses are without merit

As stated, the Homes failed to pay the increases required by their contracts because they could not afford them due to the refusal of the State Health Department to make an appropriate increase in the Medicaid reimbursement rates. Before the Board, the Homes did not question the validity of the well-settled rule that economic hardship does not excuse a violation of Section 8(d) and 8(a)(5). See Oak Cliff-Golman Baking Co., supra, 207 NLRB at 1064. Rather, the thrust of their principal defense was that they should be exempt from application of that rule because they are members of the health care industry. We show below that the Board--while cognizant of the Homes' financial plight in the wake of New York State's freezing the Medicaid reimbursement rates--properly construed the 1974 Health Care Amendments to the Act<sup>4/</sup> in declining the Home's invitation to carve out such an exception.

At the time Congress enacted those amendments, the Board had long held with court approval that an employer's financial inability to pay agreed-upon wages and benefits was, as a matter of law, no defense under Section 8(d). Thus, in George E. Light Boat Storage, Inc., supra, where the employer ceased making payments into a fund as required by his labor agreement because he was "short of funds" (153 NLRB at 1209; 373 F. 2d at 765) and, indeed, had "all but gone out of business" (373 F. 2d at 770), the court nevertheless adopted the Board's 8(a)(5)

<sup>4/</sup> Public Law No. 93-960, 93rd Cong., 2nd Sess., July 26, 1974, 88 Stat. 395.



finding for, as the Board stated, "neither private convenience nor economic and business exigencies justify unlawful conduct." 153 NLRB at 1220. Accord: N.L.R.B. v. Huttig Sash & Door Co., supra, 377 F. 2d at 966; N.L.R.B. v. Lambert, 211 F. 2d 91, 92, 93 (C.A. 5, 1954) (unilateral changes in contract terms relating to employees' fringe benefits because of "not having finances to pay them," and refusal to bargain because employer could not "afford to operate under a union agreement any longer" both violate the Act); N.L.R.B. v. Pappas & Co., 203 F. 2d 569, 570 (C.A. 9, 1953); N.L.R.B. v. Gluek Brewing Co., 144 F. 2d 847, 853 (C.A. 8, 1944); Osage Mfg. Co., 173 NLRB 458, 462 (1968). For the same reason, in N.L.R.B. v. Israel Putnam Mills, Inc., 197 F. 2d 116, 117 (1952), this Court rejected the claim that an employer's financial condition, allegedly making impossible any modification of existing working conditions, justified his refusal to bargain. And the Fifth Circuit has rejected an employer's contention that amendments to the Fair Labor Standards Act required, and hence justified, unilateral wage increases, because the "good faith bargaining requirement of the Act includes matters covered by law where, as here, they relate to terms and conditions of employment." N.L.R.B. v. Union Mfg. Co., 200 F. 2d 656, 659 (1963). Accordingly, absent compelling reasons to exempt the Homes from this axiomatic rule, it is no defense that New York State's freezing the 1976 Medicaid reimbursement rates justified the Home's unilateral refusal to pay the wage and benefit increases due in 1976.

Nothing in the Health Care Amendments or any other part of the Act warrants such an exemption. Rather, if anything, the Board's refusal to carve out a "health care" exception to Section 8(d)'s blanket proscription against unilateral midterm contract modifications was, in effect, mandated by the 1974 Amendments and their legislative history. Congress' principal concern in enacting that legislation was that health care employees, performing essentially the same functions as covered industrial workers, should not be excluded from full enjoyment of the rights and benefits of self-organization guaranteed other employees under the Act, including protection of their collectively-bargained contracts. N.L.R.B. v. Intern. Broth. of Elec. Workers, L. 388, 548 F.2d 704, 708 (C.A. 7, 1977); 120 Cong. Rec. 16900 (May 30, 1974, remarks of Representative Ashbrook), Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act (GPO, 1974), p. 291; S. Rept. No. 93-766, 93rd Cong., 2nd Sess., p. 2, Leg. Hist., supra, p. 10; H. Rept. No. 93-1051, 93rd Cong., 2nd Sess., pp. 4-5, Leg. Hist., supra, pp. 272-273. Congress also recognized that in certain situations collective bargaining rights had to be balanced against the pressing concerns of patient care. Accordingly, in addition to extending the Board's jurisdiction to nonprofit hospitals, Congress enacted special provisions for strike notice and mediation applicable to all health care institutions designed to avoid disruption of patient



care through strikes.<sup>5/</sup> But Congress did not otherwise amend Section 8(d). And, indeed, it had no reason to, since Section 8(d), by imposing the obligation to maintain mandatory contract terms during the effective period of the contract absent consent of the Union, operates as another potent deterrent of conduct likely to cause disruptive strikes. For, notwithstanding either a contractual no-strike pledge or the notice requirements of Section 8(d), health care employees apparently could strike to protest serious employer unfair labor practices that undermine their Union--for example, as here, repudiation of the contract. Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 284-289 (1956). As Senator Williams, chairman of the Senate committee in charge of the 1974 Amendments, explained, "the Section 8(g) provision [for notice to the Federal Mediation Agency] could not be interpreted so as to preclude a union from striking to protest an employer's unfair labor practice without serving the 10-day notice period." 120 Cong. Rec. 22575 (July 10, 1974), Leg. Hist., supra, p. 362.

<sup>5/</sup> Section 8(d) and (g) of the National Labor Relations Act (29 U.S.C. 158(d) and (g)), and Section 213(a) of the Labor-Management Relations Act (29 U.S.C. 183). See N.L.R.B. v. Intern. Broth. of Elec. Workers, L. 388, supra, 548 F.2d at 706-712. See also S. Rept. No. 93-766, 93rd Cong., 2nd Sess., pp. 4-5, 6, Leg. Hist., supra, pp. 11-12, 13; Conference Rept. to accompany S. 3203, S. Rept. No. 93-988, 93rd Cong., 2nd Sess., p. 5, Leg. Hist., supra, p. 356. Profit-making nursing homes are one type of health care institution covered by those provisions of Section 8(d) and (g). See Section 2(14) of the Act.

Congress could not have intended Section 8(d)'s scheme for avoiding such disruptions to apply fully to health care employers and, at the same time, intended that an exception based on supposed economic necessity, applicable solely to such employers, be read into that Section. For in that event, health care employees would enjoy lesser rights under the Act than their brethren in all other industries, a result clearly contrary to the stated primary purpose of the Amendments. Supra, p. 9. Indeed, Senator Taft, a co-sponsor of the bill which formed the basis for the enacted legislation, explained that unless expressly modified by Congress, the "procedures for collective bargaining in health care institutions" were to be governed by "the basic mechanism outlined in the NLRA [which] was left intact for health care institutions." 120 Cong. Rec. 12945 (May 2, 1974), Leg. Hist., supra, pp. 114-115. And Senator Williams twice cautioned the Board, and, by inference, reviewing courts, not to read into the Act any special treatment for health care employers not expressly set forth in the Amendments (120 Cong. Rec. 22575-22576 (July 10, 1974), Leg. Hist., supra, pp. 361, 364):

This legislation is the product of compromise, and the National Labor Relations Board in administering the Act should understand specifically that this committee understood the issues confronting it, and went as far as it decided to go and no further and the Labor Board should use extreme caution not to read into this Act by implication--or general logical reasoning--something that is not contained in the bill, its report and the explanation thereof.

\* \* \* \* \*

My overriding point is that in this carefully tailored legislation, Congress decided to treat the health care industry uniquely in certain respects. It decided to go



so far, and no more. I trust this bill will be treated by the NLRB and its General Counsel in the same spirit, and not as an excuse to search out and litigate all possible situations, or substitute its will for that of the Congress.

In light of the above, we submit that the Board properly concluded here (A. 16) that "[n]owhere in the [1974 Amendments to the] law is there any relaxation of or exemption from, the collective bargaining obligations" imposed upon the Homes by Section 8(d). Accordingly, as a matter of law it is irrelevant that external economic conditions made it difficult for the Homes to honor their contractual commitments to the Union. For, as the Board explained in Oak Cliff-Golman, supra, 207 NLRB at 1064:

Nowhere in the statutory terms [of Section 8(d)] is any authority granted to [the Board] to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to [the Board] to be a desirable economic objective.

In the alternative, the Homes contended before the Board that they and the Union negotiated the instant contract with the understanding that New York State would continue its practice--first established about 1970 and continued through 1975--of permitting the Homes to "pass through" all the contractual wage and benefit increases in the form of higher Medicaid rates, and that the State's abandonment of that practice in 1976 excused them from performing under the contract. See A. 9; 62, 186, 240-243, 252, 256-257, 264-265. The short answer is that the record does not support the Homes' contention. For, as the Board correctly found (A. 13; 87-90, 163a-164a, 167-169, 181-184, 208-210), there was simply no understanding between the parties that the wage and benefit increases payable during the four-year life of the contract were contingent

*upon the State's*

A continuing its policy of "catch-up" Medicaid reimbursement rate increases.

Indeed, when the Homes asked for such a protective, contingency clause during negotiations in late 1974, the Union expressly rejected that proposal (Id.). No such protection is in the contract Id.). From the fact that the Homes asked for protection, it is also obvious that they were aware that the catch-up raises were not guaranteed to continue. Nevertheless, as the Board found (A. 16):

With this awareness [the Homes] were willing to assume the risk in their contracts with the Union of being obliged to pay increases in wages and benefits to the employees that might not necessarily be totally allowed in the State Health Department reimbursement rates for Medicaid. In the circumstances, [they] cannot now complain of the Board's requiring them to pay what they agreed upon.<sup>10/</sup>

<sup>10/</sup> A variation of this same argument was made by the Homes when they asserted that their violation was excused because, unlike unregulated businesses which can raise prices to cover increased wage and benefit expenses, their rates were fixed too low and they were powerless to earn enough to pay the contracted-for amounts. However, as the Board noted (A. 15), "the Act has covered . . . regulated, as well as unregulated businesses . . . and public utilities whose services and rates are regulated by state and federal governmental agencies, who enjoy no special dispensation from the bargaining obligations of Section 8(d)."



CONCLUSION

For the foregoing reasons, we respectfully request the Court to enter an order enforcing the Board's order in full.

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